BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

IN THE MATTER OF	)	
	)	
REGULATORY REQUIREMENTS	)	
FOR INCUMBENT LEC	)	
BROADBAND	)	**CC DOCKET NO. 01-337**
TELECOMMUNICATIONS	)	
SERVICES	)	
	)	

To the Commission:

COMMENTS OF THE UNITED STATES INTERNET INDUSTRY ASSOCIATION ("USIIA")

David P. McClure
President & CEO
US Internet Industry Association
815 Connecticut Ave. NW, Suite 620
Washington, DC 20006
(703) 924-0006 Voice
(703) 924-4203 Fax
(703) 851-4784 Mobile
dmcclure@usiia.org
http://www.usiia.org

TABLE OF CONTENTS

Summary.....3

Statement of Standing 4

Statement of Facts.....5

Comments of the USIIA 6

1. **The Nature of the Broadband Internet Markets** 6
2. **Broadband Internet Is An Information Service**.....9
3. **Application of Title II, Sections 201 and 202**.....11
4. **Deployment of Broadband With Minimal Regulation** 12
5. **Fair and Equitable Regulation of Broadband Internet**.....13

SUMMARY OF FILING

The US Internet Industry Association ("USIIA"), the leading national trade association of companies engaged in Internet commerce, content, and connectivity; submits on behalf of its members and the industry it serves these comments in response to the Notice of Proposed Rulemaking with respect to the Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services.

USIIA believes that the current regulatory environment for Broadband Internet is ineffective in that it hinders deployment of Broadband services, and that efforts to apply telephony regulation to Internet services has created a environment detrimental to the growth and well-being of the Internet industry.

USIIA makes the argument that Broadband Internet is an information service, and that Title II, Sections 201 and 202 of the Communications Act of 1934, as amended, can and should apply to the transport of this information service. These Sections relate only to non-discriminatory provision of services and network interconnectivity essential to the nature of the Internet, however, and should not be confused with the complicated and arcane regulatory schema applied to ensure competition in telephony markets.

USIIA also provides relevant information on the nature and scope of the nascent Broadband markets, and comments with regard to the appropriate regulatory environment of the future.

STATEMENT OF STANDING

USIIA is a national trade association of competitive companies engaged in Internet commerce, content and connectivity. Its 300 members constitute a cross-section of the Internet industry, providing consensus on policy issues that breach the competitive interests of any single member or segment of the industry.

USIIA members, through their annual dues and membership status, entrust the Association to represent their interests before regulatory and legislative bodies at the international, national and local levels. The Association's positions on issues represent a consensus of the opinions of its members, expressed through the USIIA Public Policy Committee, membership in which is open to all members in good standing; and through its Board of Directors, elected from among the membership. As the appointed representative of its members charged with advancing their economic interests and assisting in achieving and maintaining their legal and competitive parity, USIIA has standing to file these comments.

USIIA has no financial interest in the outcome of the proceedings. The comments presented are based on a consensus of the best interests of the Internet industry and its members, and are not subject to change or withdrawal due to any contracts, agreements, competitive pressures, market valuations or corporate strategies.

STATEMENT OF FACTS AND BACKGROUND

On December 20, 2001, the Commission released a *Notice of Proposed Rulemaking* to consider whether incumbent local exchange carriers should be treated as non-dominant in the provision of broadband telecommunications services. The *Notice* sought comment on what changes, if any, the Commission should make to its traditional regulatory requirements for incumbent LECs' provision of broadband services.

As summarized in the Federal Register[1], the Notice addresses a number of issues, from the current state of the Broadband industry to an application by SBC Communications to be declared a non-dominant carrier in some of its operating areas.

The heart of the question, however, revolves around two broader questions of policy:

- To what extent should Title II common carrier regulation, arising largely out of sections 201 and 202 of the Communications Act of 1934, as amended, be applied to incumbent LEC provision of broadband services?

- How can the Commission best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation?

. The comments of the USIIA in this matter are filed in CC Docket 01-337 in order to address these two specific issues raised in the NPRM, and to provide input to the development of the next generation of regulatory regimes for Broadband Internet..

[1] See 67 Fed. Reg. 1945 (Jan. 15, 2002).

COMMENTS OF THE USIIA

From the outset, the Commission has had difficulty adapting Internet and Broadband services into its existing structure and regulatory regimen for telephone, radio, satellite, cable and wireless communications. First defined as an enhanced service, Internet services have posed some definitional problems because these services contain both a transmission component and an information component.

Much of the difficulty has arisen because Internet services – and particularly Broadband Internet – are suitable for transmission across platforms that otherwise have offered unique and non-overlapping services. Cable services, for example, have been traditionally considered under a different regulatory regime than either television or telephony. But the clear distinction between these transmissions venues blurs substantially when Broadband Internet is provided across any or all of these platforms.

The Nature of the Broadband Internet Markets. Currently, four main technologies provide broadband services to consumers: cable modem, DSL, satellite, and fixed terrestrial wireless.[2] While these technologies overlap and compete today, cable companies are the dominant incumbents in the broadband business, with existing broadband-capable infrastructure reaching most U.S. homes. As of September 2001, there were 6.2 million cable modem subscribers in the U.S., compared to 2.8 million residential DSL subscribers, and 100,000 broadband satellite and fixed wireless subscribers.[3]

Cable television networks pass more than 90% of the 105 million households in the U.S., and approximately three-quarters of all households passed by cable are passed by networks that now have the two-way capabilities needed for cable modem functionality.[4] According to analysts, cable modem service is actually being offered today to between 50% and 66% of all U.S. homes.[5] The nation's seven largest cable operators – AT&T Broadband, Time Warner, Comcast,

[2] Other technologies not yet widely available may be used to deliver broadband in the future, including Electrical Grid, Business Passive Optical Network ("BPON") technology and Fiber To The Home ("FTTH").
[3] *Broadband Fact Report* at 1.
[4] *Id.* at 4.
[5] *Id.*

Charter, Cox, Adelphia, and Cablevision – serve more than 80% of all cable subscribers, and approximately 95% of all cable modem subscribers.[6]

Cable not only has a substantial lead over other broadband technologies, but it also continues to add new subscribers at a faster rate.[7] Over the past year, cable has increased its market share of new subscriber additions. Even before cable operators began this latest growth spurt, the FCC predicted that cable operators would continue to serve the majority of residential broadband customers until at least 2004,[8] and industry analysts expect cable to maintain a considerable lead over DSL and other broadband technologies for the foreseeable future.[9]

DSL is provided over the existing local telephone network by connecting digital modems over copper loops to the central office, and then ensuring that those loops are free of electronics (*e.g.*, load coils) that are needed to provide voice service but inhibit the provision of data services.[10] One reason DSL has fewer subscribers than cable is that it is available to fewer potential subscribers than cable. Analysts estimate that cable modem service was available to between 50% and 71% of U.S. households as of first quarter 2001 and that it will be available to between 66% and 77% of U.S. households by the end of 2001.[11] By contrast, analysts estimate that DSL was available to between 34% and 43% of all households as of first quarter 2001, and that it will be available to approximately 45% by the end of 2001. [12]

---

[6] *Id.*
[7] *Id.* at 1.
[8] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Second Report, 15 FCC Rcd 20913, 20985, ¶ 189 (2000) ("*Second Advanced Services Report*") ("Many analysts expect that over the next five years, cable modem subscriptions will continue to increase dramatically, reaching an average estimate of 15.2 million subscribers by year-end 2004."); *id.* at 20986, ¶ 191 ("Many analysts predict that, over the next five years, residential DSL subscription will grow to 13 million.").
[9] *Broadband Fact Report* at 12.
[10] There are two main variations of DSL: asymmetric ("ADSL"), which has a higher downstream than upstream transmission rate; and symmetric ("SDSL"), which offers an equal downstream and upstream rate. ADSL is the most common form of DSL, and is used most often with residential customers, whereas SDSL is used primarily for business customers. Second Advanced Services Report, 15 FCC Rcd at, 20930-31 ¶¶ 36-37.
[11] *Broadband Fact Report* at 13-14.
[12] *Id.* at 14.

Broadband satellite services are provided using the same constellation of Direct Broadcast Satellites ("DBS") that currently provide video services to more than 17 million subscribers.[13] These geostationary satellites operate in the Ku-band and have broad geographic footprints that enable them to provide service to virtually all U.S. homes.[14] Until recently, satellite broadband used a telephone line as the upstream return path. In late 2000, two satellite providers – StarBand and Hughes – began providing two-way broadband services.[15] In the next few years, several additional two-way broadband satellite services using the Ka-band are expected to become available.[16]

Terrestrial wireless uses high-frequency spectrum to transmit signals to a stationary transceiver up to several miles away.[17] The main fixed wireless services provided to residential customers use the Microwave Multipoint Distribution System ("MMDS"), which uses spectrum in the 2.4 GHz band. WorldCom and Sprint own most MMDS spectrum in the United States, and have commercially deployed MMDS in a handful of markets.[18] Several companies also plan to offer residential broadband services using unlicensed spectrum bands, including the 2.45 GHz Industrial-Scientific-Medical (ISM) band and the 5.8 GHz Unlicensed National Information Infrastructure (UNII) band.[19] In addition, the FCC recently authorized the creation of a new Multipoint Video and Data Distribution Service ("MVDDS"), which will be licensed on a nationwide basis to share the 12.2-12.7 GHz band with DBS and other satellite operators.[20]

Although both two-way satellite and fixed wireless are new technologies with very small market shares at present, they are expected to grow rapidly and take share from the cable modem and DSL operators in the coming years.[21] According to one report, "[t]wo-way satellite broadband Internet access will be the fastest growing single-access technology. . . . This rapid

---

[13] *Broadband Fact Report* at 5; SkyReport, *National DTH Counts: October 2000 - October 2001*, *at* <http://www.skyreport.com/dth_us.htm> (visited Dec. 18, 2001).
[14] *Broadband Fact Report* at 5.
[15] *Id.* at 5-6.
[16] *Id.* at 6.
[17] *Id*; *Second Advanced Services Report*, 15 FCC Rcd at 20933, ¶ 43.
[18] *Broadband Fact Report* at 6 (citation omitted).
[19] *Id.* at 6-7.
[20] *See generally Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 4096 (2000).

growth will reflect the introduction and aggressive marketing of several high-profile satellite Internet services to the residential market during the 2002 to 2004 period, as well as the continued expansion of the installed base of satellite dishes in U.S. households for satellite TV broadcast services such as DirecTV."[22]

These four technologies, along with other emerging platforms for Broadband, form a robust market. The FCC has itself noted with approval "a continuing increase in consumer broadband choices within and among the various delivery technologies," which indicates that "no group of firms of technology will likely be able to dominate the provision of broadband services."[23]

Broadband Internet Is An Information Service. The Telecommunications Act of 1996 defines an "information service" that is distinct from "telecommunications service." The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[24] Under these definitions, the FCC has tentatively and correctly classified Broadband Internet as "information service" rather than a "telecommunications service."[25]

This service, as delineated by the US Supreme Court, include "electronic mail, automatic mailing list services ('mail exploders,' sometimes referred to as 'listserves'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web,'[26] but may eventually evolve into other services. Broadband Internet does not change across platforms – all of these elements are present in Broadband Internet information services, regardless of the method of transmission.

---

[21] J.P. Morgan Cable Study at 39-40 & Fig. 41.
[22] Business Communications Co., *Market for Broadband Internet Access Continues to Soar*, Broadband Opportunities: A Mini Series (Nov. 1, 2001).
[23] *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11864-65, ¶¶ 17, 19 (2000); *see also, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9866 ¶ 116 (2000) (finding that cable operators, despite having a commanding share of the broadband market, face "significant actual and potential competition from . . . alternative broadband providers").
[24] 47 U.S.C. § 153(20). Congress further specified that the term "information service" includes "electronic publishing, but does not include any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."
[25] *Report to Congress*, 13 FCC Rcd at 11521, para.73
[26] *Reno v. ACLU*, 521 U.S. at 851.

Broadband Internet does require a medium for transmission, which the Telecommunications Act of 1996 defines as telecommunications, "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[27]

USIIA therefore views Broadband Internet to be an information service that is transparently available across multiple platforms, and that these platforms constitute telecommunications. Further, we note that these telecommunications are virtually identical -- all provide Internet access at comparable speeds.[28] They are available at similar prices.[29]

Equally significant, the service providers clearly, and appropriately, view one another as direct competitors. Time Warner and AOL have touted the "significant actual and potential competition affording consumers adequate choice across existing and emerging [broadband] platforms."[30] The recent refusal of cable companies to sell advertising time to phone companies to promote DSL service confirms that cable modem providers perceive DSL providers to be their direct competitors.[31]

Moreover, consumers view the technologies as interchangeable. Recent survey results confirm the opinions of industry analysts who describe broadband consumers as "platform agnostic."[32] In essence, consumers want broadband functionality, and they do not care what kind of hardware or software is used to implement that functionality.

---

[27] 47 U.S.C. § 153(43).

[28] Also, unlike most narrowband technologies, the four main consumer broadband technologies allow customers to connect to the Internet without tying up their traditional voice telephone lines.

[29] *Broadband Fact Report* at 9-10. Two-way satellite services, which have been commercially available for less than a year, are about 40% more expensive than cable modem, DSL, or fixed wireless services at present – *i.e.*, they cost about $70 per month rather than $35-$50. But broadband satellite prices have already begun to decline and are expected to decline further in the near future. Moreover, the equipment needed for broadband satellite may also be used for video service, which provides added value that must be factored into any straight comparison. And some satellite providers have begun offering special discounts to customers that purchase both video and Internet access services. *See id.* at 10.

[30] Reply of America Online, Inc. and Time Warner Inc., at 16, CS Docket No. 00-30 (FCC filed May 11, 2000).

[31] *Cable Giants Refuse to Sell Ads to Internet Competitors*, N.Y. Times, June 8, 2001, at C1; Erik Wemple, *Cable Giants Hit Over ISP Ad Policies*, Cable World, June 11, 2001.

[32] *Broadband Fact Report* at 8; *see also, e.g.*, Ariana E. Cha, *Broadband's a Nice Pace If You Can Get It*, Washtech.com (Feb. 28, 2001), ("People don't really care whether it's cable or DSL or satellite, or a carrier pigeon

Application of Title II, Sections 201 and 202. It is the belief of the USIIA that Broadband Internet services, which are transparently identical and offer identical services across all platforms, should not be regulated differently according to the transmission medium involved. To do so would be to invoke regulatory disparity which would act to limit intermodal competition and interfere with the operations of a free market.

Through its Computer Inquiry proceedings beginning in 1966, the FCC created different regulatory classifications for data and telephone services. So-called "basic" services were determined to include common carrier telecommunications, subject to the FCC's Title II interconnection and tariffing requirements. "Enhanced" services, on the other hand, are covered only by Title I "wire communications" regulations.

Under this framework, dominant basic telecom service providers, such as the ILECs, are required to provide open and non-discriminatory network access to all enhanced service providers. In 1997, the FCC formally ruled that Internet access is an enhanced service and not a basic telecommunications service. Thus, ISPs are not subject to common carrier regulations and must be provided with equal access to ILEC networks.

Cable Internet, meanwhile, is regulated under Title VI, as outlined in the 1984 Cable Act, not through Title I or II regimes. As a result, cable operators are not inherently subject to the basic/enhanced service distinctions created for common carriers. This would result in regulatory disparity that would serve to impede the deployment of Broadband on one platform in favor of another. "Cable operators would be permitted to provide such advanced cable services under a Title VI regime, free of interconnection and unbundling requirements, while certain telecommunications carriers would be obligated to offer network interconnection, unbundled network elements, and tariffed rates to competing enhanced and information service providers.[33]"

---

for that matter, as long as they have the quality they need for a price they find affordable." (quoting Lisa Pierce, telecommunications analyst, Giga Information Group)

[33] "Internet Over Cable: Defining the Future in Terms of the Past," Barbara Esbin, associate bureau chief of the FCC Cable Service Bureau, 1998.

It is the position of USIIA that regulatory parity is necessary to effect the rapid deployment of Broadband Internet. To the maximum extend possible, USIIA favors the classification of Broadband as an information service under Title I, and will state so in the proceeding that has opened on this issue. Inherent in this position is the belief that provisions for interconnection and access by ISPs can and should be accommodated under the competition mandate of Title I.

If it is found that Title I is not appropriate, and that the telecommunication component of Broadband must require the application of Title II regulation under Sections 201 and 202, USIIA believes it essential that all platforms – including cable, satellite and wireless – that offer Broadband Internet should be regulated in the offering of Broadband services under the same regulatory schema as landline Broadband services.

Deployment of Broadband With Minimal Regulation. USIIA believes that some level of legislation and regulation is necessary to the survival and growth of any industry. When such regulation is used arbitrarily, or in favor of one segment of an industry over another, the results can be disastrous.

The Commission has been mindful of this potential for damage, and has traditionally taken a light hand to regulation of the Internet. Yet there have been, even in this "light hand" environment, regulations that brought severe unintended consequences to the Internet services industry. Two such consequences were:

- **The Sunday Massacre.** In the wake of the 1996 Act, then FCC Commissioner Reed Hundt brokered a complex agreement among long-distance carriers and local exchange carriers to reduce costs for the ILECs while simultaneously lowering long distance costs for consumers. The tradeoff was that consumers and businesses would pay more for additional telephone lines, but would benefit from lower long distance fees to offset these line charges. This, however, was of little benefit to the nation's neophyte ISPs, who were suddenly burdened with thousands of dollars in additional fees for their dial-up lines and Points-of-Presence with no means to offset the charges. Within the Internet industry,

Hundt's deal became known as the "Sunday Massacre," as the lowest tier of Internet Service Providers were forced out of business by the cost increases.

- **Foot Soldiers in the Telco Wars.** Beginning in 1996, federally mandated reciprocal compensation payments made it very lucrative for Internet Service Providers either to affiliate with Competitive LECs or become CLECs themselves. The CLECs sought out ISPs as customers and were able to offer them below-market rates because of this windfall, and ISPs were strongly encouraged in national seminars to "get in on the free money." The result was that ISPs became CLECs to save a few dollars, with little understanding of the intense regulatory environment they were entering. Worse yet, hundreds of ISPs were forced to choose sides in such battles as entry into long-distance markets, even though these were not central to their primary businesses. When reciprocal compensation was reviewed and adjusted by the FCC, the reversal of these rates caused CLECs to raise their prices to Internet Service Providers, and more independent ISPs to exit the business. This was a major contributing factor to the "Internet crash" of 2001.

Fair and Equitable Regulation of Broadband Internet. The Notice of Proposed Rulemaking for CC Docket 01-337 poses two crucial questions. First, to what extent do the provisions of Title II apply to Broadband Internet? And Second, what is the appropriate regulatory regime for Broadband Internet to stimulated growth?

The answer to both questions is to treat Broadband Internet as an information service that is transmitted by telecommunication. The telecommunication carriers that transmit the information should likewise be treated as common carriers, subject to the requirements of the Communications Act of 1934, as amended, to deliver service; to do so in a non-discriminatory manner; and to price that service fairly. The alternative – to continue to treat some platforms as common carriers and others not; to heavily regulate one segment of the industry while scarcely regulating others; and to tie the future of Broadband to the future skirmishes over who is allowed to offer long distance calling – will only serve to further impede the deployment of Broadband and other enhanced services.

Any regulatory schema adopted for Broadband must, to be effective, also embrace the tenets of Sections 201 and 202 of Title II and the concept of regulatory parity among common carriers offering Broadband transport.

Respectfully submitted,

March 1, 2002

David P. McClure
President & CEO
US Internet Industry Association